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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

COMMERCE COMPANY, d/b/a LAMAR HOTEL,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Commerce Company, doing business as Lamar Hotel, petitions for a Writ of Certiorari to review the April 7, 1964, decree of the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

Although not officially reported, the Fifth Circuit opinion is in the Appendix 1a, and is reported in 328 F. 2d 600. No opinion was written on rehearing.

The findings of fact, conclusions of law, and the order of the Board in the Clarification and Decertification cases (R. 39-45) are in the Appendix 5a, and are reported at 137 N.L.R.B. No. 137. The findings of fact, conclusion of law and the order of the Board in the Unfair Labor Practice Case (R. 87-103) are in the Appendix 11a, and are reported at 140 N.L.R.B. No. 32.

JURISDICTION

1. The Decree sought to be reviewed Appendix 3a, was dated and entered on April 7, 1964.

2. The opinion directing entry of a decree enforcing order of National Labor Relations Board Appendix 1a was dated and entered on March 3, 1964.

3. A Petition for Rehearing (R. 171) was filed on March 20, 1964.

4. Order Denying Rehearing (R. 183) was dated and entered on March 30, 1964.

5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. May the lower court lawfully enforce the Board's extension of the certification year and "Order to Bargain" with a repudiated, minority union on a new ground, failure to bargain, even though (1) the Board found and declared the Court's new ground (failure to bargain) to be immaterial and irrelevant, (2) the Board refused to admit evidence on this "failure to bargain" issue, (3) the Board relied on three stated grounds which do not include the Court's "failure to bargain" ground, (4) the Petitioner was advised by the Board that the entire bargaining history (certainly, including a "failure to bargain") during the certification year was not a relevant consideration, and (5) therefore, no evidence of or defense to any such "failure to bargain" charge is in the record?

2. May the lower court lawfully enforce the Board's order on the Court's new ground which was not the basis for the Board's action or should the Board's order be

judged upon the grounds the record discloses was the basis for the Board's order?

3. Did the Board have the *discretion* to "prolong" Petitioner's "duty to bargain" beyond the statutory Certification Year by "granting" the Union a six months' extension of the Certification Year?

STATUTE INVOLVED

The controlling statute — 49 Stat. 453, 61 Stat. 143, 65 Stat. 601, 73 Stat. 525, 29 U.S.C. 159(c)(1)(2) and (3) — provides for decertification petitions; this is the controlling statutory provision:

> "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or . . .
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a *question of representation* affecting commerce exists shall provide for an appropriate *hearing* upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an *election* by secret ballot and shall certify the results thereof.

(2) In determining whether or not a *question of representation* affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought . . .

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held . . ." (Emphasis added)

STATEMENT OF THE CASE

The history of this "order to bargain" case pivots around the September 23, 1960, Certification of the Union (R. 31), and the Board's later dismissal of an employee Decertification Petition filed after the certification year.

After the Certification, a dispute immediately arose with respect to whether the jobs of 11 employees brought them within the Board's unit designation. The Union refused to consider whether the 11 employees were in or outside the unit. Even as late as the "clarification hearing" on December 5, 1961, the Union representative continued to insist that unit placement of the eleven individuals was not a "question that it (the Union) could answer." (R. 155-156)

On December 5, 1961, the Union reversed its original position and agreed with the Petitioner (R. 157):

"MR. McCARTY: We think before we can bargain—"

"HEARING OFFICER: Let's have a—"

"MR. McCARTY:—with any understanding we certainly ought to have the unit clarified so that we know who we are bargaining for."

Petitioner agrees that the resolution of the placement issues was necessary; yet, the Union's refusal for more

than a year to attempt their amicable resolution was not a reasonable basis for extending the Certification Year.

On May 18, 1961, the Union filed a Motion to Clarify (determine the unit placement of 11 employees) and never requested another bargaining meeting. This falls short of justifying the lower Court's finding of a "Failure or Refusal to Bargain". Six months later, on November 6, 1961, the Board, belatedly and after the Certification Year, ordered a hearing on such motion.

At the December 13, 1961 hearing, 14 months after the certification, for the first time, the Union "stated a position" on the unit placement issues; Petitioner quickly agreed on all except one employee; the Board sustained Petitioner's, not the Union's, position on the placement of the only person who continued in dispute (R. 44). The Respondent's attempts to cast Petitioner in a "bad light" on the placement issues are entirely without merit, because the only ultimately disputed issue was resolved in Petitioner's favor.

There is no evidence and no Board finding that Petitioner "deprived" the union of any part of "its" certification year or Petitioner "failed to bargain".

THE DECERTIFICATION PETITION — More than one year after the certification and while the Motion to Clarify was pending, a "Decertification Petition" supported by a clear majority was duly filed pursuant to the statute (R. 142). The Decertification Petitioner notified Petitoner of the Union's loss of majority (R. 151-152).

From petitions signed by the employees, the Board *administratively determined* the "Decertification Petitioner had an adequate and *timely* showing of interest to support its Petition". This determination was made a part of the record (R. 154). At the time of the Decertification Petition

the Board does not claim the Union represented a majority and, moreover, admits sufficient employee support to raise a "question of representation". The Petition was timely filed after the "Certification Year", but the Board overcame this hurdle by extending the "Certification Year" for six months in order to nullify the Decertification Petition. The union is, therefore, an openly repudiated minority union.

The Board's extension was based on three named grounds only (R. 41-42):

(1) The unit placement dispute.

(2) Advice received by the Union from the Regional Director.

(3) Delay arising from the Union's Motion for Clarification.

However, the lower Court did not rely on any of the Board's three stated grounds but relied on another new ground — Petitioner's "failure to bargain". The lower Court's reliance on this new ground is especially unreasonable, because at the Decertification Hearing the Board refused to hear evidence on or to consider the "bargaining history" or any failure to bargain. Petitioner relied and was entitled to rely on the Board's declarations.

The Motion to Clarify and the Decertification Petition were consolidated for a joint hearing; after the hearing, the Board determined the unit placement of the 11 employees, dismissed the Decertification Petition and ordered Petitioner to bargain for six additional months (R. 44). Petitioner refused to bargain, because the Board's extension of the certification year was unlawful, arbitrary and unreasonable. The validity of the lower Court's enforcement of this "order to bargain" is now the ultimate issue.

PETITIONER IS NOT EVEN ACCUSED OF AN UNFAIR LABOR PRACTICE PRIOR TO THE END OF THE CERTIFICATION YEAR — In spite of the lower Court's new, bizarre "failure to bargain" finding, Petitioner was neither accused nor convicted of any unfair labor practice during the certification year. The Board did not find that the Union's loss of majority was caused by the employer's fault or any unfair labor practice.

The Union filed a wrongful refusal to bargain charge on March 28, 1961; after receiving Petitioner's denial, the Union and Regional Director withdrew the charge (R. 40).

The lower Court assumed Petitioner would have been convicted, if tried on this charge. A Board order may not reasonably be enforced by assuming Petitioner would have been convicted, if tried on another and dismissed charge.

HOLDING BELOW

The Fifth Circuit held:

> ". . . that there is a good deal of weight in the board's position, that its action in this case was not beyond its powers; and, in view of the undisputed evidence as to '*earlier failure to bargain*', we think the board's action, in making the order dismissing the decertification petition and granting the union an additional six months beyond the certification year in which to bargain, was reasonable and proper." (Emphasis added)

REASONS FOR GRANTING THE WRIT

The Court enforced the Board's order to bargain, because of its new, novel finding that Petitioner "failed to bargain". This is a novel deviation from the orthodox "refusal to bargain" finding under Section 8 (a)(5) of the Act.

The Board did not find Petitioner "failed to bargain" but based its order on three different grounds, to-wit (R. 41-42):

> ". . . because of the *DISPUTE* which arose *OVER THE UNIT PLACEMENT* of the 11 employees described in its *MOTION FOR CLARIFICATION*, because of the *ADVICE IT RECEIVED FROM THE REGIONAL DIRECTOR* concerning the withdrawal of the 8(a)(5) charge which it has filed, and because of the *FILING OF THE MOTION FOR CLARIFICATION AND THE DELAY* ensuing therefrom it has been deprived of a substantial amount of time necessary to the proper enjoyment of its certification. . . ."

None of the Board's three stated grounds were relied on by the Court, and, believe it or not, the Court's ground for decision was held immaterial by the Board.

THE COURT'S "FAILURE TO BARGAIN" FINDING IS IN DIRECT CONFLICT WITH THE BOARD'S FINDING THAT THE PRIOR BARGAINING HISTORY WAS IMMATERIAL — The "failure to bargain" relied on by the lower court to justify the extension of the certification year is INCREDIBLE in light of the Board's holdings that "failure to bargain" and the bargaining history is not material; this immateriality ruling was made time and again at the hearing on the Decertification Petition. For Example:

> "HEARING OFFICER: Mr. Vickery, I would prefer not to go into the history of bargaining and all that because I don't think it is material . . ." (R. 150)

> "HEARING OFFICER: Well, let's don't argue. Let's don't argue. I have sustained the objection. And I might reiterate that if this is designed to attack the petitioner's showing of interest, it's not admissible.
>
> "If it's designed to attempt to show that there was some conduct which might constitute an unfair labor practice, it is not admissible . . ." **(R. 156)**

"HEARING OFFICER: Well, Mr. McCarty, again that is something that is not in issue in this case. We are not litigating whether the union has attempted to negotiate or whether the employer has attempted to negotiate, or the relations between the parties . . ." (R. 156)

"MR. McCARTY: Well, it should not be so complicated because we have not exercised all of the reasonable means to get together and conclude a satisfactory contract, excluding or including —"

"HEARING OFFICER: Well, let's not pursue that any further. It's not really material. . . ." (R. 157)

"MR. KENNEY: It was brought out by the attorney for the employer that it was the fault of the union that negotiations never took place after they —

"MR. VICKERY: I object to that argument because there's nothing in the record to support it.

"HEARING OFFICER: I don't think that's material, Mr. Kenney. Actually we're not here for the purpose of exploring prior negotiations." (R. 159)

These rulings were affirmed by the Board (R. 41):

'The consolidated hearing was held before C. L. Stephens, Hearing Officer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.'"

After these plain assurances that prior negotiations would not be considered, were not being litigated, and were immaterial, the Court may not reasonably rely on the "forbidden issue" for enforcement. Consideration of these "forbidden issues" without evidence or Board findings is arbitrary and extremely unfair. This is so plainly contrary to the rudimentary elements of fair play, the Court's decision should not be permitted to stand.

The lower Court makes no attempt to reconcile the Board's immateriality holdings with its contrary holding that the bargaining history is the ultimate "benchmark" on which Petitioner's obligations depend. This basic conflict was "swept under the rug" and does not appear on the face of the lower Court opinion.

After the Board repeatedly assured Petitioner that evidence of bargaining history and "prior negotiations" were irrelevant, the lower Court may not reasonably decide the case on the very issue forbidden to Petitioner; this is injustice rendered rank by the Board's contrary assurances. In light of the Board's repeated findings of immateriality, Petitioner submits the Court's reliance on a "failure to bargain" (bargaining history) is contrary to the law, unreasonable and plainly wrong.

Moreover, the Court's reason for granting the extension of the Certification Year — UNDISPUTED EVIDENCE AS TO "EARLIER FAILURE TO BARGAIN" — is without any evidentiary support or fact finding in the record. This decision is manifestly unfair, because Petitioner was precluded from litigating this controlling issue by Board rulings. There is not only no evidence of a "failure to bargain", but, on the other hand, Petitioner was assured that prior negotiations and bargaining history were immaterial:

> "HEARING OFFICER: Mr. Vickery, I would prefer not to go into the history of bargaining and all that because I don't think it is material . . ." (R. 150)

> "HEARING OFFICER: Well, Mr. McCarty, again that is something that is not in issue in this case. We are not litigating whether the union has attempted to negotiate or whether the employer has attempted to negotiate, or the relations between the parties . . ." (R. 156)

"HEARING OFFICER: I don't think that's material, Mr. Kenney. Actually we're not here for the purpose of exploring prior negotiations". (R. 159)

The Fifth Circuit's attempt to turn this case on a new ground which the Board declared irrelevant, requires the exercise of this Court's supervisory powers to confine judicial review within its well established boundaries — i.e., review of the Board's order is limited to the grounds relied on by the Board.

THE BOARD'S DECISION IS NOT BASED ON THE "FAILURE TO BARGAIN" GROUND RELIED ON BY THE COURT — The Board's decision is not based on a "failure to bargain", but is based on the following carefully, plainly, stated grounds (R. 41-42):

> "On the other hand, the Union contends that the decertification petition is not timely and should be dismissed. The Union argues, in effect, that because of the *DISPUTE* which arose *OVER THE UNIT PLACEMENT OF THE 11 EMPLOYEES* described in its Motion for Clarification, because of the *ADVICE IT RECEIVED FROM THE REGIONAL DIRECTOR* concerning the withdrawal of the 8(a)(5) charge which it has filed, and because of the *FILING OF THE MOTION FOR CLARIFICATION AND THE DELAY* ensuing therefrom it has been deprived of a substantial amount of time necessary to the proper enjoyment of its certification. *ON THESE GROUNDS*, the Union moves to dismiss the decertification petition. We find merit in the contentions of the Union." (Emphasis added.)

Although the Board did not FIND nor BASE its decision on a "failure to bargain", the Court, nevertheless, found and relied only on a "failure or refusal to bargain"; "failure to bargain or the bargaining history" ground was suggested for the first time by the Court. Furtheremore, during the

representation hearing, the Board, time and again assured Petitioner a refusal to bargain, prior negotiations and prior failure or refusal to bargain were immaterial. (R. 150, 156, 157 and 159).

The Board's announced ground — "because of the dispute which arose over the unit placement of eleven employees described in its (the Union) Motion for Clarification" — may not be reasonably equated with the Court's "failure to bargain". A dispute may arise as an integral part of "good faith" bargaining without any "failure or refusal to bargain". Each of the other Board grounds for decision — (1) delay on the "Motion to Clarify", and (2) Regional Director advice — is as far from a "failure to bargain" as the infinite is from zero.

Securities and Exchange Commission v. *Chenery Corporation*, 318 U.S. 80, conflicts with the Court's decision, because the Board did not base its action on a "failure to bargain", and CHENERY teaches that the Court must judge the Board's order on the Board's grounds. Although *CHENERY* is an S.E.C. rather than an N.L.R.B. case, the same basis for judgment applies to Board proceedings. This is very important to the administration of the Act and should be firmly established in the jurisprudence. The Board's order must stand or fall upon the basis the record discloses was the basis for the Board's action:

> ". . . Its opinion plainly shows that the Commission purported to be acting only as it assumed a court of equity would have acted in a similar case. Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. THE GROUNDS UPON WHICH AN ADMINISTRATIVE ORDER MUST BE JUDGED ARE THOSE UPON WHICH THE RECORD DISCLOSES THAT ITS ACTION WAS BASED.

> "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason' . . . " (S.E.C. v. CHENERY CORP., 318 U.S. 80 at 87, 88).

Since the decision of the Board was explicitly based upon three stated grounds, its validity must be judged on the three stated grounds. Because the only basis for enforcement was a new ground which the Board rejected as immaterial, the Court's enforcement of the Board's order is plainly unlawful.

This rule has been frequently applied to N.L.R.B. proceedings in the Courts of Appeals. See *U.A.W.* v. *N.L.R.B.*, 300 F.2d 699 (C.A.-D.C.); *N.L.R.B.* v. *Landy Manufacturing Corporation*, 286 F.2d 424 (C.A. 2). CHENERY precludes the lower Court's reliance on its "failure to bargain" motion, because the Board did not base its action on this ground. The Board's order should be judged upon the Board's grounds; the Court may not substitute a different ground or basis for enforcing the decision, a fortiori, the Court may not reasonably rely on the ground the Board found immaterial and repeatedly assured Petitioner would not be considered.

THE BOARD HAD NO DISCRETION TO EXTEND THE CERTIFICATION YEAR — 29 U.S.C. 159(c)(1)(2) and (3) provide for decertification petitions after one year; the Board had no discretion to extend the certification year so as to deny the statutory decertification election. The statutory command is unequivocal, 29 U.S.C. 159(c)(1):

> ". . . IF THE BOARD FINDS upon the record of such hearing that such a QUESTION OF REPRE-

SENTATION EXISTS, IT SHALL DIRECT AN ELECTION by secret ballot and shall certify the results thereof." (Emphasis added)

The statute prescribes only one "benchmark" — whether or not a "question of representation exists" — and clearly commands a "finding" on this issue. The direction to make a "finding" on the statute's "benchmark" may not reasonably be equated with enlarging the Board's discretion to roam unconfined and vagrant. The "benchmark" establishes the STATUTORY STANDARD rather than DISCRETION as the only condition to decertification.

The Board made no express finding of whether or not "a question of representation exists", the only ultimately relevant finding. Petitioner submits that the Board believed a "question of representation existed"; and, nevertheless, avoided the statute's direction to order an election by arbitrarily extending the certification year. This will not do, because the statute leaves no room for discretion to extend the statutory 12 months for the certification year nor to ignore the statutory "benchmark".

The Board's failure to make a finding on the "question of representation" issue is even more remarkable in light of the fact that it was necessary for the Board to have a "reasonable cause to believe that a question of representation existed", before ordering the December hearing on the decertification petition. This is made plain in 29 U.S.C. 159(c)(1)(B):

> ". . . if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . ."

The statute (29 U.S.C. 159(c)(1)) provides, "if the Board finds . . . , it shall direct an election". The phrase "it shall direct an election" could not be plainer, could not be more

precise, and could not more clearly leave NOTHING to the Board's discretion, if and when the statutory finding is made.

Petitioner submits the statutory command makes a decertification election available upon the statutory showing of a "question of representation" rather than by the grace or at the discretion of the Board. Moreover, the statute (29 U.S.C. 159(c)(3)) does not commit the length of the certification year to either the Board's grace or discretion.

THE UNIT PLACEMENT DISPUTE IS NOT A "FAILURE TO BARGAIN" — Although the Board carefully excluded all evidence of bargaining and "prior negotiations", the Court may have been misled into the erroneous holding of a "failure to bargain" by the unit placement dispute.

Petitioner took the position that the resolution of unit placement was mandatory while the union took the position that unit placement was irrelevant (R. 138-140). Finally, in May of 1961, the union and the Labor Board accepted the Petitioner's view, and the Motion for Clarification was filed (R. 33-36). Petitioner's insistence on the resolution of this issue cannot be fairly tortured into a refusal or failure to bargain. This is especially true, because the union and the Board adopted Petitioner's position. The last exchange of correspondence on this issue, Petitioner's letter of May 11, 1961, was conciliatory and invited further negotiations:

> "The hotel is patiently awaiting your statement of position to each of these eleven employees and is unable to understand why the union cannot define who it claims to represent." (R. 138-140)

Since bargaining was invited by Petitioner on May 11, 1961, and there is no evidence of any subsequent "failure to bargain", the Court's finding of a "failure to bargain" is grossly

unfair, intuitive and without basis in the record. The fact that the finding is of a "FAILURE" rather than the conventional "REFUSAL TO BARGAIN" indicates the Court was unwilling to find a "refusal" to bargain. The failure to bargain finding is as unwarranted as a refusal to bargain would have been; in fact, as in *N.L.R.B.* v. *Florida Citrus Canners Cooperative*, 288 F. 2d 630 (C.A. 5) there may be no "failure to bargain" by an employer without a refusal, because the union rather than the employer must request bargaining. The Court's finding that the undisputed evidence establishes a "failure to bargain" is bizarre; this is especially true, because the Board excluded evidence on this issue.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In a nutshell the reasons for granting the writ are:

(1) The Fifth Circuit's decision enforcing the Labor Board Order based on a reason or ground not found nor relied on by the Board conflicts with the standards of judicial review established in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80 and the holding of other circuits in labor board cases. *U.A.W.* v. *N.L.R.B.*, 300 F. 2d 699 (C.A. — D.C.) and *N.L.R.B.* v. *Lundy Manufacturing Corporation*, 286 F. 2d 424 (C.A. 2). Although *Chenery* reviews an Order of the S.E.C., the same rule should apply to review of a Labor Board decision based on stated grounds. The resolution of this conflict looms large in the daily administration of the Act and is a special and important reason for granting this writ.

(2) The Fifth Circuit's failure to limit its review of the Board's orders to the grounds relied on by the Board calls for an exercise of this Court's power of supervision in order to assure proper judicial review in the daily administration of the Act.

(3) The Fifth Circuit's reliance on a ground for extension of the certification year which was rejected by the Board is manifestly improper judicial review which calls for an exercise of this Court's supervisory powers to assure that judicial review is confined within its proper boundaries.

CONCLUSION

For each of the foregoing reasons, Petitioner submits a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

A copy of this Brief and Petition has been served pursuant to Rule 33 by depositing two copies of this Petition in a U. S. Mail Box, with air mail postage prepaid addressed to:

Solicitor General
Department of Justice
Washington 25, D. C.

Mr. Mallet Marcel-Prevost
National Labor Relations Board
Washington 25, D. C.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20477

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COMMERCE COMPANY d/b/a LAMAR HOTEL,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(March 3, 1964.)

Before HUTCHESON and BELL, Circuit Judges, and BREWSTER, District Judge.

HUTCHESON, Circuit Judge: This not at all a run of the mine case. The order of the board was based not on a finding that the failure to bargain, to which the board's order was directed, occurred within the first year of certification, but on the ground that, under the board's decision in *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785, the board had the right, because of respondent's failure to bargain during part of the first year, to extend the year for a period equivalent to that part of the year in which the respondent had failed to bargain.

Respondent insists that it had taken its action in refusing to bargain in the good faith belief that the union, which had been certified, had lost its majority and that the board's

action upon the pretended authority of the *Mar-Jac Poultry* case, *supra*, in extending the union's certification period for an additional time, was invalid because neither statute nor decision authorizes such action.

In support of this view, respondent cites and strongly relies on *NLRB* v. *Minute Maid*, 283 F(2) 705 (5th Cir.) and *NLRB* v. *Florida Citrus Canners Coop.*, 288 F(2) 630 (5th Cir.).

The board, citing and relying on *NLRB* v. *Sonics Corp.*, 312 F(2) 610, *Ray Brooks* v. *NLRB*, 348 U.S. 96, *NLRB* v. *Sharon Hats, Inc.*, 289 F(2) 628, *Superior Engraving Co.* v. *NLRB*, 183 F(2) 783, and *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, insists that the board was right and the respondent wrong.

A careful reading of the briefs and cases cited by both sides and consideration of the oral arguments convince us: that there is a good deal of weight in the board's position, that its action in this case was not beyond its powers: and, in view of the undisputed evidence as to earlier failure to bargain, we think the board's action, in making the order dismissing the decertification petition and granting the union an additional six months beyond the certification year in which to bargain, was reasonable and proper.

ENFORCED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20477

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COMMERCE COMPANY d/b/a LAMAR HOTEL,
Respondent.

DECREE

Before: Hutcheson and Bell, Circuit Judges and Brewster, District Judge.

BY THE COURT:—

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on December 21, 1962. The Court heard argument of respective counsel on January 7, 1964, and has considered the briefs and transcript of record filed in this cause. On March 3, 1964, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged, and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Respondent, Commerce Company d/b/a Lamar Hotel, its officers, agents, successors, and assigns abide by and perform the direction of the Board in said order contained.

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Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(March 30, 1964)

On Petition for Rehearing

BEFORE HUTCHESON and BELL, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

137 NLRB No. 136

Houston, Texas
D 3099

SUPPLEMENTAL DECISION CLARIFYING CERTIFICATION OF REPRESENTATIVE AND ORDER DISMISSING DECERTIFICATION PETITION

(Number and Title Omitted)

On September 23, 1960, the Regional Director for the Twenty-third Region issued a certification of representative in which he certified Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, as the exclusive collective bargaining representative of the Employer's employees in the unit found appropriate by the Board in its Decision and Direction of Election,[1] and subsequently amended by the Board on September 12, 1960.[2]

After the Union was certified, it engaged in collective bargaining with the Employer and a dispute arose with respect to the unit placement of 11 employees. As a result of this dispute, on March 28, 1961, the Union filed a charge alleging that the Employer refused to bargain in violation of Section 8(a)(5) of the Act.[3] Subsequently, on May 18, 1961, pursuant to the advice of the Regional Director, the Union withdrew its unfair labor practice charge and filed

[1] *Lamar Hotel*, 23-RC-1561, August 15, 1960, not reported in printed volumes of Board decisions.

[2] The unit description was amended pursuant to a Motion for Redetermination of Unit filed by the Employer. The certified unit is as follows:

> All employees of the Employer at the Lamar Hotel, Houston, Texas, including regular part-time employees, office clerical employees, auditing department employees, but excluding temporary and irregular part-time employees, confidential employees, professional employees, guards, and supervisors as defined in the Act.

[3] Case No. 23-CA-1193.

a Motion for Clarification of the certified unit. In this motion, the Union requested a hearing to determine the unit placement of the 11 employees named therein. On November 6, 1961, the Board issued an Order Directing Supplemental Hearing for the purpose of taking testimony and other evidence as to the unit placement of the 11 named employees then in dispute.

On November 13, 1961, before the Board-ordered hearing commenced but after the certification year had expired, a decertification petition was filed by an employee asserting that the Union was no longer the representative of the employees in the aforedescribed unit, as defined in Section 9(a) of the Act. Thereupon, the Regional Director consolidated the remanded proceeding on the motion for Clarification together with the RD proceeding for purposes of hearing.

The consolidated hearing was held before C. L. Stephens, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this proceeding to a three member panel.

The Employer and the Petitioner in Case No. 23-RD-100 contend that the RD petition is timely since it was filed more than 12 months after the Union was certified as exclusive bargaining representative and at a time when no 8(a)(5) charge was pending. In addition, the Petitioner also contends that he has satisfied all prerequisites for the filing and processing of his petition and that an election should now be ordered. Finally, both the Employer and the Petitioner contend, in pertinent part, that the Union's Motion for Clarification is moot by virtue of the expiration of the certification year and the filing of the decertifi-

cation petition. On these grounds the Employer and the RD Petitioner move to dismiss the Union's Motion for Clarification.

On the other hand, the Union contends that the decertification petition is not timely and should be dismissed. The Union argues, in effect, that because of the dispute which arose over the unit placement of the 11 employees described in its Motion for Clarification, because of the advice it received from the Regional Director concerning the withdrawal of the 8(a)(5) charge which it had filed, and because of the filing of the Motion for Clarification and the delay ensuing therefrom it has been deprived of a substantial amount of time necessary to the proper enjoyment of its certification. On these grounds, the Union moves to dismiss the decertification petition. We find merit in the contentions of the Union.

In *Mar-Jac Poultry Company, Inc.*, 136 NLRB No. 73, where an employer, by refusing to bargain, deprived the union of its bargaining rights for a substantial part of its certification year, the Board dismissed an employer's petition which the employer had filed after the certification year had expired, and granted the union an additional period beyond the certification year for bargaining. In that same case, the Board also announced that in future cases, where other similar inequities appear, the Board will grant an additional period of time beyond the certification year for purposes of bargaining. We believe that such inequities appear in the instant proceeding.

Here, it appears that during the course of bargaining the parties were in disagreement over the unit placement of some 11 employees. As the result of this dispute, bargaining ceased, and the Union filed 8(a)(5) charges against the Employer. Thereafter, pursuant to advice received

from the Regional Director, the Union, in order to resolve the unit placement dispute, withdrew the 8(a)(5) charges and filed its Motion for Clarification. However, before the unit placement dispute could be resolved by the Board, the certification year expired. It appears that during the pendency of the above described 8(a)(5) charge and the Union's Motion for Clarification the parties have not engaged in collective bargaining.

From the foregoing, it appears that approximately six months have elapsed from the filing of the 8(a)(5) charge to the expiration of the certification year. During this period of time, the Union has been deprived of its right to unimpeded collective bargaining. Accordingly, following the *Mar-Jac Poultry* doctrine, we shall sustain the Union's motion to dismiss the decertification petition and grant the Union an additional period of six mo ns from the resumption of negotiations in which to engage in collective bargaining.

Turning to the unit placement of the 11 named employees in the Motion for Clarification, the record shows that during the course of the consolidated hearing the parties stipulated that 9 of the 11 employees named in the Motion for Clarification should be included in the unit. In accordance with the parties' stipulation we shall therefore include Vivian Buchanan, Ross H. Collins, Evelyn Crutchfield, Betty Cannon, Richard C. Johnson, N. L. Patella, C. C. Penn, L. B. Nance and Ben Atkinson.[4]

Finally, with respect to the unit placement of Martin Amador, the Employer contends that he should be excluded as a supervisor and the Union would include him as

[4] The record shows that Lenora Smith, also named in the Union's motion, was no longer employed by the Employer at the time of the hearing. We shall not consider her unit placement.

an employee. The record shows that Amador directs the works of waiters and bus boys. He receives compensation which is about 20 percent higher than that received by the waiters. In addition, it appears that he effectively recommended the hiring of a waiter about three weeks prior to the hearing. The record also shows that he assigns the banquet waiters, room service waiters and bus boys to their specific work stations and that these employees have been informed that Amador is their "boss." In view of the foregoing, we find that Martin Amador is a supervisor within the meaning of the Act, and we shall therefore exclude him from the bargaining unit.

ORDER

IT IS HEREBY ORDERED that the Certification of Representative heretofore issued in Case No. 23-RC-1561, be, and it hereby is, clarified by specifically including in the unit therein found appropriate, Vivian Buchanan, Ross H. Collins, Evelyn Crutchfield, Betty Cannon, Richard C. Johnson, N. L. Patella, C. C. Penn, L. B. Nance, Ben Atkinson,[5] and by specifically excluding Martin Amador as a supervisor.

[5] Should any of the above-named employees no longer be employed by the Employer, or, if they are not now engaged in the same or substantially similar employment as shown in the record, then, this clarification shall apply to their replacements who are performing those jobs which gave rise to the unit placement dispute.

IT IS FURTHER ORDERED that the petition in Case No. 23-RD-100 be, and it hereby is, dismissed.

Dated. Washington, D. C. Jul 12 1962

.....
Frank W. McCulloch, Chairman

.....
John H. Fanning, Member

.....
Gerald A. Brown, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

INTERMEDIATE REPORT

Statement of the Case

(Number and Title Omitted)

Upon a charge duly filed on July 31, 1962, by Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board through the Acting Regional Director for the Tewnty-third Region issued a complaint, dated August 3, 1962, alleging that Commerce Company d/b/a Lamar Hotel, herein called the Respondent or the Company, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act. The Respondent's answer denies the commission of any unfair labor practices.

Pursuant to notice a hearing was held at Houston, Texas, on September 24, 1962, before the undersigned Trial Examiner. All parties were present and represented at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. When some question was raised regarding the proper name of the Respondent the hearing, with the consent of all parties, was continued until October 9. On October 8, I received a stipulation and motion to close the record executed by all parties and on the same date I issued a telegraphic order receiving the stipulation in evidence and closing the record.[2] In accordance with the terms of the stipulation the parties reserved the right to file briefs on or before October 22. On October 19, I received a brief from the General Counsel.

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[1] The correct name of the Respondent as stipulated by all parties.

[2] The stipulation, motion, and order are received in evidence and marked Trial Examiner's Exhibit 1.

Upon the entire record in the case, including the record in prior representation and decertification cases, I make the following:

Findings of Fact

I. The correct name and business of the Respondent

The complaint alleges that Lamar Hotel, a Texas corporation, maintains its principal office and place of business at Houston, Texas, where it is engaged in operating a hotel. During the 12 months preceding the issuance of the complaint the gross revenue from its hotel operation exceeded $500,000, and in the same period it purchased goods and materials which were shipped to it directly from points outside the State of Texas, valued in excess of $5,000.

The answer admits the jurisdictional fact allegations, but avers the Respondent, Lamar Hotel, is not a Texas corporation.

In the above-mentioned stipulation the parties stipulated that:

> Respondent, LAMAR HOTEL, is a trade name of the Commerce Company, a Texas corporation, and has been at all times material herein.

I, therefore, find and conclude that the correct and proper name of the Respondent is the one set forth in the caption of this case and the correction applies to all references to Lamar Hotel in the pleadings herein.

Contrary to the Respondent's assertion that the admitted jurisdictional facts do not establish the requisite jurisdictional commerce, I find the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

The parties stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. *The issue*

The question presented is whether the Company refused to bargain collectively with the Union about July 14, 20, and 24, 1962, after it had been certified by the Board as the statutory representative of the Company's employees in a unit appropriate for the purpose of collective bargaining. The facts are not disputed and the issue here is a legal one.

B. *Proceedings leading to the Union's certification*

On August 15, 1960, the Union filed a petition and after hearing the Board issued its Decision and Direction of Election and thereafter an election was conducted among the employees as directed.[3] Subsequently, the Board on September 12, 1960, pursuant to the Company's Motion for Redetermination, amended the bargaining unit as follows:

> All employees of the Employer at the Lamar Hotel, Houston, Texas, including regular part-time employees, office clerical employees, auditing department employees, but excluding temporary and irregular part-time employees, confidential employees, professional employees, guards, and supervisors as defined in the Act.

On September 23, 1960, the Regional Director issued a certification of representative to the Union as the exclusive

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[3] *Lamar Hotel*, 23-RC-1561, not reported in printed volumes of Board decisions.

bargaining representative of the Company's employees in the above-described unit.

Thereafter the Union and the Company engaged in collective bargaining and a dispute arose with respect to the unit placement of 11 employees. As a result of this dispute the Union, on March 28, 1961, filed a charge alleging that the Company had refused to bargain in violation of Section 8(a)(5) of the Act.[4]

On May 18, 1961, the Union withdrew its charge and filed a Motion for Clarification of the certified unit, and requested a hearing to determine the unit placement of the 11 employees named therein. On November 6, 1961, the Board issued an Order Directing Supplemental Hearing for the purpose of taking testimony and other evidence as to the unit placement of the 11 employees in dispute.

On November 13, 1961, after the certification year had expired, a decertification petition was filed by an employee asserting the Union was no longer the representative of the employees in the above-described unit, as defined in Section 9(a) of the Act.[5] The Regional Director thereupon consolidated the Motion for Clarification and the RD proceeding for the purpose of hearing.

Following the hearing, the Board, on July 12, 1962, issued a Supplemental Decision Clarifying Certification of Representatives and Order Dismissing Decertification Petition,[6] herein referred to as the Supplemental Decision. In brief, the Board clarified the unit by specifically including therein and excluding therefrom the employees in the dispute, granted the Union's motion to dismiss decertification petition because it was untimely and, as the certifi-

[4] Case No. 23-CA-1193.
[5] Case No. 23-RD-100.
[6] 137 NLRB No. 136.

cation year had expired, granted the Union an additional period of 6 months from the resumption of negotiations to engage in collective bargaining.

C. The refusal to bargain

On July 12, 1962, the Union sent a letter to the Company wherein it stated that in accordance with the Supplemental Decision it was submitting two copies of a proposed contract and requested a reply within 5 days respecting the time, date and place to commence negotiations.

On July 20, the Union addressed a second letter to the Company requesting a list of employees, the pay rate for each department included in the certified unit and changes, if any, in the pay schedule since the date of certification.

On July 20, the Union sent a third letter to the Company wherein it pointed out the Company had failed to answer its request to commence contract negotiations and advised the Company it was available and ready to confer at any time, date, and place, and requested a reply within 5 days regarding the commencement of bargaining negotiations.

By letter dated July 27, the Company notified the Union it was refusing to bargain with it for the following reasons.

(1) The Union no longer represents a majority of the hotel employees and the Hotel has a good faith doubt that the Union represents a majority of its employees.

(2) The Board's erroneous refusal to order an election on the decertification petition does not alter the Union's loss of majority status; moreover, the Board's erroneous order does not impose on the Hotel any lawful obligation to bargain.

(3) The filing of the Decertification Petition, the employees' signatures submitted to the Board on the supporting petitions, and the demands of the Petitioner in the decertification case that the Hotel refuse to bargain plainly establishes the Hotel belief—the Union lost its majority—is not only reasonable but plainly right.

As appears above, the Union filed a charge on July 31, and the complaint issued on August 3.

Concluding Findings

The complaint in substance alleges that subsequent to the Union's demands for bargaining negotiations on July 14, 20, and 24, the Company since July 27, has unequivocally refused to meet or otherwise bargain with the Union as the exclusive representative of its employees in the unit described above. The answer of the Company admits the appropriateness of the unit and that it refused and is now refusing to bargain collectively with the Union. Affirmatively, the Company seeks to justify its refusal to bargain on the same grounds as set forth in its letter of July 27, to the Union, namely that the Union did not, and does not, represent a majority of the employees in the unit and that the Company and the employees supporting the decertification petition are entitled to an election to determine whether the Union represents a majority of the employees in the certified unit.[7] The answer further states that the Union's Motion for Clarification did not deprive the employees of their statutory right to renounce the Union, nor

[7] On August 7, 1962, Joe Melton and other employees filed a Petition of Intervention in this case, which the Regional Director referred to the Trial Examiners' Division for ruling thereon. The General Counsel filed his opposition to the petition and on August 21, Trial Examiner George A. Downing issued an order denying the petition for leave to intervene. Neither Melton nor any other employee appeared at the hearing on September 24, 1962.

did the protracted litigation of this motion operate to extend the certification year so as to preclude the employees from asserting their right to renounce the Union.

Plainly, the Company's refusal to bargain with the Union stems from its disagreement with the findings and conclusions in the Board's Supplemental Decision for all issues and arguments advanced here were appropriately presented to and fully considered and determined by the Board in its Supplemental Decision.[7] It is, of course, well settled that issues which have been fully litigated in a prior representation proceeding may not be relitigated thereafter in a complaint proceeding, unless it can be shown that facts not then known had subsequently become available and were of substantial materiality to the resolution of the issues involved.[8] The Company, having declined the Union's request to bargain in the certified unit on July 27, 1962, I find that on that date and at all times thereafter the Company has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate

[7] There is no merit to the Company's contentions that the Supplemental Order is not an "order to bargain," and that a new election should be held in the certified unit since the Union no longer represents a majority of the employees therein, as evidenced by the decertification proceeding. While an order certifying a union is not a final order within the meaning of Section 10(f) of the Act, the Supreme Court, in *Ray Brooks* v. *N.L.R.B.* (348 U.S. 96), held that an employer is under a statutory duty to bargain with the union certified by the Board, even though, shortly after the election which resulted in the certification, the union lost its majority through no fault of the employer. See also, *N.L.R.B.* v. *Clark & Lewis Co.* (274 F. 2d 817 (C.A. 5)).

[8] *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 161-162; *N.L.R.B.* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 200-201 (C.A. 6), cert. denied 328 U.S. 866; *Allis-Chalmers Manufacturing Co.* v. *N.L.R.B.*, 162 F 2d 435 (C.A. 7); *Quaker City Life Insurance Company*, 138 NLRB No. 5, 50 LRRM 1537; *Continental Bus System, Inc., etc.*, 138 NLRB No. 103, 51 LRRM 1184.

unit in violation of Section 8(a)(5) of the Act and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) thereof.[10]

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section III above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that the Respondent cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached embody such understanding in a signed agreement.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

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[10] *Quaker City Life Insurance Company and Continental Bus System, supra, Sam Belz Upholstered Products Company, Inc.* 138 NLRB No. 60, 51 LRRM 1073; *Howard Rippee, et al., d/b/a Pacific Multiforms Company,* 138 NLRB No. 89, 51 LRRM 1141.

Conclusion of Law

1. Commerce Company d/b/a Lamar Hotel is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act.

3. All employees of the Respondent at the Lamar Hotel, Houston, Texas, including regular part-time employees, office clerical employees, auditing department employees, but excluding temporary and irregular part-time employees, confidential employees, professional employees, guards, and supervisors as defined in the Act constitute a unif appropriate for the purpose of collective bargaining with the meaning of Section 9(b) of the Act.

4. The above-named labor organization was on September 23, 1960, and at all times thereafter, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing, on and since July 27, 1962, to bargain collectively with the above-named labor organization as the exclusive representative of its employees in the aforesaid appropriate unit, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

Commerce Company d/b/a Lamar Hotel, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours of employment, and other conditions of employment, with Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of all its employees in the following appropriate unit:

> All employees of the Respondent at the Lamar Hotel, Houston, Texas, including regular part-time employees, office clerical employees, auditing department employees, but excluding temporary and irregular part-time employees, confidential employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or relater manner, interfering with the efforts of Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, to bargain collectively for the employees in the said appropriate unit as the exclusive bargaining agent.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining agent in the appropriate unit, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at the Lamar Hotel, Houston, Texas, copies of the notice attached hereto and marked "Appendix."[11] Copies of said notice, to be furnished by the Regional Director for the Twenty-third Region shall, after being signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director in writing within 20 days from the date of the receipt of this Intermediate Report and Recommended Order what steps the Respondent has taken to comply herewith.[12]

Dated at Washington, D. C.

/s/ Reeves R. Hilton
Reeves R. Hilton
Trial Examiner

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[11] In the event that this Recommended Order be adopted by the Board the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[12] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL, upon request, bargain with HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such an understanding in a signed agreement. The bargaining unit is:

All employees of the Respondent at the Lamar Hotel, Houston, Texas, including regular part-time employees, auditing department employees, but excluding temporary and irregular part-time employees, confidential employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner, interfere with the efforts of **HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO,** to bargain collectively for the employees in the appropriate unit as the exclusive bargaining agent.

COMMERCE COMPANY
D B A LAMAR HOTEL
(EMPLOYER)

Dated..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston 2, Texas (Tel. No. Capitol 8-0611, Ext. 271), if they have any question concerning this notice or compliance with its provisions.

140 NLRB No. 32 D-5053
Houston, Texas

DECISION AND ORDER

(Number and Title Omitted)

On October 30, 1962, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto.[1] Thereafter, the Respondent filed exceptions to the Intermediate Report[2] and the General Counsel filed limited exceptions.[3]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the excep

[1] We hereby correct the following inadvertent errors in the Intermediate Report: In the section entitled "C. *The refusal to bargain*," the date of the first letter to the Respondent should be July 14, 1962, instead of July 12, and the date of the third letter should be July 24 instead of July 20.

[2] As the record, including the exceptions, adequately presents the issues and the positions of the parties, the Respondent's request for oral argument is hereby denied.

[3] The General Counsel excepted to the apparently inadvertent omission from the Findings of Fact in the Intermediate Report of the following jurisdictional fact: "During this same period less than 75% of its guests remained for a month or longer." Inasmuch as this was alleged in the complaint and admitted by the Respondent in its answer, the Intermediate Report is amended accordingly.

tions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

140 NLRB No. 32

IR-482-62
Houston, Tex.

ORDER

The Board adopts as its Order the "Recommended Order" of the Trial Examiner.

Dated, Washington, D. C. Dec. 21 1962.

.....
Frank W. McCulloch, *Chairman*

.....
Boyd Leedom, *Member*

.....
Gerald A. Brown, *Member*
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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CITATIONS

Cases:

Brooks v. *National Labor Relations Board*, 348 U.S. 96 — 6, 8

Houston Chronicle Publishing Co., 130 NLRB 1243, enforcement denied, 300 F. 2d 273 — 7

Local 1545, Carpenters v. *Vincent*, 286 F. 2d 127 — 6

Mar-Jac Poultry Co., 136 NLRB 785 — 4, 6, 7, 8

National Labor Relations Board v. *Marcus Trucking Co.*, 286 F. 2d 583 — 6

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*):

Section 8(a)(1) — 5

Section 8(a)(5) — 3, 5

Section 9(c)(1) — 5

723-780—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1103

COMMERCE COMPANY, d/b/a LAMAR HOTEL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals opinion (Pet. 1a–2a) is reported at 328 F. 2d 600. The Board's decision and order (Pet. 24a–25a; R. 102–103)[1] are reported at 140 NLRB 226. The Board's decision in the underlying representation proceeding (Pet. 5a–9a; R. 39–44) is reported at 137 NLRB 1271.

JURISDICTION

The judgment of the court of appeals (Pet. 1a–2a) was entered on March 3, 1964, and an application for

[1] References designated "R." are to the Transcript of Record printed for the use of the court below and filed with the petition; those designated "B.A." are to the Board's Appendix.

rehearing was denied on March 30, 1964 (Pet. 4a). The decree (Pet. 3a) was entered April 7, 1964. The petition for a writ of certiorari was filed on May 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board could properly extend the vitality of its certification of a union representative for six months beyond the usual twelve-month period upon finding that the employer had declined to bargain during a substantial part of that period.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) are set forth in the petition (Pet. 3–4).

STATEMENT

On September 23, 1960, following a representation election which the Union[1] won (130 to 90), the Board certified it as the exclusive bargaining representative for "[a]ll employees of the Employer at the Lamar Hotel, Houston, Texas, including regular part-time employees, office clerical employees, auditing department employees, but excluding temporary and irregular part-time employees, confidential employees, professional employees, guards, and supervisors as defined in the Act" (R. 27–30).

The Union and the Company proceeded to engage in collective bargaining. A dispute arose with respect

[1] Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

to whether the jobs of 11 employees brought them within the unit described by the Board's certification.[1] The Union sought to bargain about the terms of the contract without first settling this issue, but the Company refused to meet further until the matter had been decided by "agreement" or "authoritative administrative determination" (B.A. 28–34). Thus, a letter from the Company to the Union, dated March 23, 1961, concluded (B.A. 30–31), "Therefore, a meeting with you does not appear in order until our respective obligations, if any, are determined." As a result, on March 28, 1961, the Union filed a charge with the Board alleging that the Company had unlawfully refused to bargain in violation of Section 8(a)(5) of the Act (R. 45–48). At the Regional Director's suggestion, however, the Union withdrew this charge on May 18, 1961, and on the same day filed a motion for clarification of the certified unit and requested a hearing to determine the unit placement of the 11 employees (R. 33–36). On November 6, 1961, the Board issued an Order Directing Supplemental Hearing for the purpose of taking testimony and other evidence as to the employees in dispute (R. 38–39).

[1] These 11 employees had been among the 14 who had voted at the representation election at the insistence of the Company, but whose ballots were challenged and not counted by the Board's representative because their jobs were not included in the unit described by the Board in its Direction of Election (R. 21, 27–28, 35). At the time of the election, the Company had a motion pending before the Board to redetermine the unit by including several job classifications which had been excluded (R. 22–26). The Board granted this motion after the election (R. 29–30), but never passed upon the challenges or counted the ballots because they were not sufficient in number to affect the results of the election.

On November 13, 1961, a decertification petition was filed by an employee, Joe Melton, asserting that the Union no longer represented a majority of the employees in the certified unit (R. 61–64). For purposes of hearing, the Regional Director consolidated the proceeding on the petition with the proceeding on the Union's motion for clarification (R. 36–37).

The consolidated hearing was held on December 5, 1961 (B.A. 1). By that time, one of the 11 employees was no longer working for the Company, and the parties stipulated that 9 others were within the unit described by the Board in its certification (R. 43). On July 12, 1962, the Board issued its decision (Pet. 5a–9a). It clarified the certification by adding to the unit the 9 employees covered by the stipulation, and by finding that Amador, the only employee whose status remained in question, was a supervisor and should be excluded (Pet. 8a–9a). In addition, the Board found that the decertification petition was untimely and ordered it dismissed.

The Board predicated the latter action on its decision in *Mar-Jac Poultry Co.*, 136 NLRB 785, where it had held that it would extend the twelve-month period during which a Board certification is normally immune from challenge for an additional period of time where it appears that, due to action on the employer's part, there was a suspension in bargaining during a substantial portion of the twelve-month period. Finding that approximately six months had elapsed from the filing of the 8(a)(5) charge to the expiration of the certification year, the Board granted the Union "an additional period of six months from

the resumption of negotiations in which to engage in collective bargaining" (Pet. 8a).

On July 14, 1962, the Union sent a letter to the Company, requesting collective bargaining and enclosing two copies of a proposed contract (B.A. 12–13). On July 27, 1962, the Company notified the Union that it was refusing to bargain with it because it believed that the Union had lost its majority and that the Board's dismissal of the decertification petition was erroneous (B.A. 18–19). The Union filed unfair labor practice charges with the Board, which found that the Company's refusal to bargain violated Section 8(a) (5) and (1) of the Act. The Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain collectively with the Union (Pet. 24a–25a, 11a–23a).

The court of appeals enforced the Board's order in full.

ARGUMENT

The court of appeals decision is correct and is not in conflict with the decisions of this Court or those of any other circuit. There is no occasion for further review.

1. Petitioner's basic substantive contention (Pet. 13-15) is that it was not obligated to bargain with the Union because the Board had improperly dismissed the decertification petition, *i.e.*, that the Board lacks discretion to decline to entertain a decertification petition which is filed more than twelve months after the certification has issued. This contention is groundless. Section 9(c)(1) of the Act (Pet. 3) provides that the Board shall proceed on a petition for

a certification or decertification election if it finds "reasonable cause to believe that a question of representation affecting commerce exists." Whether a question of representation exists is left largely to the Board's discretion. In the interest of stability, the Board has formulated certain rules for the exercise of its discretion, including the one-year certification rule approved by the Court in *Brooks* v. *National Labor Relations Board,* 348 U.S. 96. Under that rule, a Board certification, in the absence of extraordinary circumstances, is entitled to respect for at least a year, even if through no fault of the employer the union has meanwhile lost its majority status. The justification for the rule is that it guarantees a union "ample time for carrying out its mandate on behalf of its members," and removes any basis the employer may have for believing "that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time." *Brooks, supra,* at 100. But, just as some circumstances may warrant entertaining a representation petition *before* the certification year is up (see 348 U.S. at 98–99), so others may justify a refusal to entertain such a petition even *after* the certification year has expired. One such circumstance is the execution during the certification year of a collective bargaining agreement extending for a reasonable period beyond the year. See *Local 1545, Carpenters* v. *Vincent,* 286 F. 2d 127, 130–131 (C.A. 2); *National Labor Relations Board* v. *Marcus Trucking Co.,* 286 F. 2d 583, 592–593 (C.A. 2). Another, the Board concluded in *Mar-Jac Poultry,* 136 NLRB 785, *supra,*

is the suspension of bargaining during a substantial portion of the certification year as a consequence of the employer's action.

The *Mar-Jac Poultry* rule is a reasonable exercise of the Board's discretion under the Act. For, where the employer causes negotiations to be suspended, the union, through no fault of its own, loses "a substantial part of the period when Unions are generally at their greatest strength—the 1-year period immediately following the certification"; and "to permit the Employer now to obtain an election would be to allow it to take advantage of its own failure to carry out its statutory obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year" (136 NLRB at 787).

As the court below found, the Board was warranted in applying that rule here. Although, unlike in *Mar-Jac Poultry,* it was not established that the employer conduct which caused the suspension in bargaining within the certification year was unlawful,[4]

[4] In *Mar-Jac Poultry*, a complaint issued on the union's charge that the employer's refusal to bargain within the certification year was violative of Section 8(a)(5) of the Act, and the employer then entered into a settlement agreement in which he agreed to bargain in good faith with the union (136 NLRB at 786). However, the Board, in *Mar-Jac*, indicated that the principle there enunciated was not limited to the precise situation presented but was applicable to "future cases revealing similar inequities". (*id.*, at 787). See also, *Houston Chronicle Publishing Co.*, 130 NLRB 1243, 1245 enforcement denied on other grounds, 300 F. 2d 273 (C.A. 5) (a doubt as to the unit placement of certain employees is not "a license for the abandonment of orderly collective bargaining on *all other points* that may then be open before the parties").

the conduct here nevertheless resulted in depriving the Union of the full bargainng to which it was entitled. After only six months of the certification year had passed, the Company refused to bargain about contract terms until the Union negotiated, or asked the Board to decide, whether 11 named employees were included or excluded from the certified unit. The Union, adopting the course suggested by the Company, instituted proceedings before the Board to clarify the unit; but the certification year had expired before these proceedings could be completed. To permit the Union's representative status to be challenged in these circumstances would, no less than in *Mar-Jac*, deny to it the year of unimpeded bargaining which the *Brooks* rule contemplates, and enable the employer to profit by the delay which his own actions occasioned.

2. Petitioner's contention (Pet. 7–13) that the court below upheld the Board on a ground which the Board did not rely on, and indeed disavowed—*i.e.*, the Company's failure to bargain—misconceives the basis of the Board's decision. Petitioner cites a passage from the decision which does not allude to the failure to bargain, and statements by the hearing officer that the history of bargaining was not "material" (Pet. 10–11). The quoted passage, however, merely summarized the Union's contentions before

the Board. Later, in setting forth the reasons which prompted its action, the Board specifically relied on the prior interruption in the bargaining, stating that, as a result of the unit placement dispute, "bargaining ceased"; that "during the pendency of the * * * 8(a)(5) charge and the Union's Motion for Clarification the parties have not engaged in collective bargaining"; and that during this period of time "the Union has been deprived of its right to unimpeded collective bargaining" (Pet. 7a–8a). Moreover, the hearing officer's statements can be construed as an attempt to preclude litigation, not of the question whether negotiations had in fact been broken off, but of the further question whether such a suspension amounted to a prohibited refusal to bargain on the Company's part. Unfair labor practice issues are not relevant to a representation proceeding, and, as shown (pp. 7–8), the Board was justified in extending the life of the certification without determining whether the Company's refusal to bargain actually amounted to an unfair labor practice. In any event, even if the hearing examiner erred, the error was cured by subsequent action in the litigation, for the record does contain undisputed evidence of the Company's failure to bargain with the Union during the last six months of the certification year (B.A. 28–34).

CONCLUSION

For the above stated reasons, the petition for certiorari should be denied.

Respectfully submitted,

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